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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ROBERT CLANCEY, Plaintiff and Appellant, v. TWENTIETH CENTURY FOX FILM CORPORATION, Defendant and Respondent.	B167685 (Los Angeles County Super. Ct. No. BC267252)

APPEAL from a judgment of the Superior Court of Los Angeles County, Owen Lee Kwong, Judge. Affirmed.

Rehm & Rogari, Joanna Rehm and Ralph Rogari, for Plaintiff and Appellant.

McCune & Harber, Michael L. Parker, for Defendant and Respondent.

Robert Clancey appeals from the judgment entered after the trial court granted summary judgment for Twentieth Century Fox Film Corporation (Fox) in this personal injury action. The trial court found, because Clancey was a special employee of Fox, his tort claim was barred by workers' compensation exclusivity. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Clancey's Work on the Roswell Set*

Under a licensing agreement Fox used Stage 4 at Paramount Studios for filming its television show *Roswell*. Fox hired the production crew for *Roswell* through Entertainment Partners, a payroll and employment services company that assisted Fox with hiring, administration and payment of production personnel. By agreement with Fox, Entertainment Partners obtained workers' compensation insurance for the *Roswell* crew, named Fox as an additional insured on the policy and charged Fox for the cost of the premiums.

Clancey was part of the *Roswell* production crew for approximately 30 days from October 2000 to February 2001. His duties included constructing and hanging teasers (black drapes used to conceal off-stage areas from the camera) and moving and assisting with camera equipment, lights and sets. Before beginning work on *Roswell* Clancey signed an agreement with Fox, entitled "On Production Notice," which described him as Fox's daily employee. The agreement was signed by Clancey as "employee." Clancey understood this agreement was a condition for him to work on the *Roswell* set.

Because Fox hired the entire *Roswell* production crew through Entertainment Partners, Clancey's immediate supervisors also were associated with Entertainment Partners. The *Roswell* production crew was under the overall direction of a Fox vice-president, although Clancey stated he did not know and was never given instruction by this person. Fox had the "ultimate right" to fire a member of the *Roswell* production crew; Clancey, however, understood his immediate supervisors were the ones who would fire him from the set. All the equipment and materials Clancey used on the set were provided to him "by the production." He brought none of his own materials to the set.

After Clancey submitted a timecard to his immediate supervisor, Fox approved it and directed Entertainment Partners to issue a payroll check to Clancey. Entertainment Partners charged Fox for the salary paid to Clancey and other *Roswell* crew members, plus a fee for its services. Fox maintained in its payroll files copies of timecards and paychecks for members of the *Roswell* production crew.

Clancey believed he was an employee of Entertainment Partners, not of Fox, because he received his paychecks and W-2 form from Entertainment Partners. Clancey had received numerous jobs on different shows through Entertainment Partners and was not confined to working on one show at a time. Nevertheless, when asked to explain Entertainment Partners' role on the *Roswell* production, Clancey responded, "That's who we get our checks from." When asked whether Entertainment Partners did anything else, Clancey responded, "Not that I know of."

2. *Clancey's Alleged Injury, His Workers' Compensation Claim and the Lawsuit*

On one of his last days on the set Clancey was working for the rigging crew, hanging a teaser in the catwalks of Stage 4. He alleges he was exposed to fiberglass dust emanating from damaged soundproofing materials on the walls and, as a result, developed obstructive lung disease. Clancey filed a workers' compensation claim for his injury against the policy maintained by Entertainment Partners and received benefits through a settlement.

Clancey also filed a lawsuit against Fox, contending he was injured on the set by exposure to dust and airborne particles. Fox answered the complaint, asserting as one of its affirmative defenses that Clancey's tort action was barred by the exclusive remedy of workers' compensation because Clancey was its special employee.

3. *Fox's Summary Judgment Motion and the Trial Court's Ruling*

Fox moved for summary judgment on the ground of workers' compensation exclusivity. The trial court granted the motion, finding workers' compensation was Clancey's exclusive remedy because, as a matter of law, he was a special employee of Fox. The trial court found Fox demonstrated it had the right to control Clancey's work, Clancey had executed an employment contract with Fox, Clancey was an unskilled worker, Fox had provided the equipment and tools necessary for Clancey to perform his job and Clancey had submitted no evidence to dispute these facts. The court further found Fox established it had secured workers' compensation insurance by agreement with Entertainment Partners.

The trial court entered judgment in favor of Fox. Clancey filed a timely notice of appeal.

CONTENTION

Clancey contends the trial court erred by finding that he was a special employee of Fox and, therefore, barred from pursuing his tort claim by workers' compensation exclusivity.[1]

DISCUSSION

1. *Standard of Review*

We review a grant of summary judgment de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348; Code Civ. Proc., § 437c, subd. (c).)

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[1] Clancey also contends the trial court erred by failing to deny, or at least continue, Fox's summary judgment motion to allow him to complete outstanding discovery. (Code Civ. Proc., § 437c, subd. (h) [requiring trial court to deny or continue summary judgment motion when party demonstrates "facts essential to justify opposition may exist but cannot, for reasons stated, then be presented"].) The trial court's ruling was not an abuse of discretion. (*People ex rel. Dept. of Transportation v. Outdoor Media Group* (1993) 13 Cal.App.4th 1067, 1077 [Code Civ. Proc., § 437c, subd. (h), ruling reviewed for abuse of discretion].) Clancey failed to show the outstanding discovery might establish "facts essential to justify opposition" to summary judgment as required by the statute. He simply identified depositions he had yet to take and documents Fox had not produced without explaining what information might be discovered that would defeat Fox's motion for summary judgment. "It is not sufficient under the statute merely to indicate further discovery or investigation is contemplated." (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 548.) Moreover, the reason Clancey's discovery had yet to occur appears to be due in large part to his own failure to coordinate with Fox and take reasonable steps to schedule depositions and seek the production of documents. Indeed, Clancey rejected, or did not respond to, Fox's offer to stipulate to continue the summary judgment hearing for additional discovery and the filing of supplemental opposition.

2. *The Trial Court Properly Granted Summary Judgment on the Ground Clancey Was a Special Employee of Fox and, Therefore, Workers' Compensation Was His Exclusive Remedy*

a. *The Doctrine of Special Employment*

Under the doctrine of special employment an employee is employed in a dual capacity by a general employer and a special employer, both of which enjoy immunity from tort liability for the employee's work-related injuries based on workers' compensation exclusivity: "An employee may have more than one employer for purposes of workers' compensation, and, in situations of dual employers, the second or 'special' employer may enjoy the same immunity from a common law negligence action on account of an industrial injury as does the first or 'general' employer." (*Santa Cruz Poultry, Inc. v. Superior Court* (1987) 194 Cal.App.3d 575, 578.) "Once a special employment relationship is identified, two consequences ensue: (1) the special employer's liability for workers' compensation coverage to the employee, and (2) the employer's immunity from a common law tort action, the latter consequence flowing from the exclusivity of the compensation remedy embodied in Labor Code section 3601." (*Ibid*.; see also *Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, 175 (*Kowalski*).)

"In determining whether a special employment relationship exists, the primary consideration is whether the special employer has '"[t]he right to control and direct the activities of the alleged employee or the manner and method in which the work is performed, whether exercised or not . . . ."' [Citation.]" (*Kowalski*, *supra*, 23 Cal.3d at p. 175.) The decision, therefore, turns on "(1) whether the borrowing employer's control over the employee and the work he is performing extends beyond mere suggestion of details or cooperation; (2) whether the employee is performing the special employer's work; (3) whether there was an agreement, understanding, or meeting of the minds between the original and special employer; (4) whether the employee acquiesced in the new work situation; (5) whether the original employer terminated [its] relationship with the employee; (6) whether the special employer furnished the tools and place for performance; (7) whether the new employment was over a considerable length of time;

(8) whether the borrowing employer had the right to fire the employee and (9) whether the borrowing employer had the obligation to pay the employee." (*Riley v. Southwest Marine, Inc.* (1988) 203 Cal.App.3d 1242, 1250.)

In contrast, some circumstances tend to negate the existence of a special employment relationship, including when "[t]he employee is (1) not paid by and cannot be discharged by the borrower, (2) a skilled worker with substantial control over operational details, (3) not engaged in the borrower's usual business, (4) employed for only a brief period of time, and (5) using tools and equipment furnished by the lending employer. [Citations.]" (*Marsh v. Tilley Steel Co.* (1980) 26 Cal.3d 486, 492.)

Whether a special employment relationship exists generally is a question of fact. (*Kowalski*, *supra*, 23 Cal.3d at p. 175.) If neither the facts nor inferences are in conflict, however, the question is one of law that may be decided on summary judgment. (*Wedeck v. Unocal Corp.* (1997) 59 Cal.App.4th 848, 857 (*Wedeck*); *Johnson v. Berkofsky-Barret Productions, Inc.* (1989) 211 Cal.App.3d 1067, 1071 ["Where the facts of employment are not disputed, the existence of a covered relationship is a question of law"].)

b. *The Undisputed Facts Demonstrate Clancey Was Fox's Special Employee*

Fox satisfied its burden on summary judgment to demonstrate it had the right to control and direct Clancey's activities on the *Roswell* set. A Fox vice-president was ultimately responsible for the production and retained the right to fire a member of the *Roswell* crew. Clancey accepted an employment relationship with Fox by entering into an agreement with Fox, which described him as Fox's "daily employee" and was signed by him as "employee." He knew his acceptance of the agreement was required for him to work on the *Roswell* set. In addition to the specific employee agreement, "'consent to the special employment relationship is normally implied, by the weight of authority, from acceptance of the special employer's control' [Citations.]" (*Wedeck*, *supra*, 59 Cal.App.4th at p. 861, fn. 7.) Clancey accepted Fox's control by coming to work on the days requested and performing under the conditions imposed by Fox on the *Roswell* set in the normal course of Fox's business of producing television shows. He also received all

the tools and equipment for his work through Fox; and the place where he performed his work was determined by Fox through its licensing agreement with Paramount. All these factors demonstrate a special employment relationship between Fox and Clancey. (*Johnson v. Berkofsky-Barret Productions, Inc.*, *supra*, 211 Cal.App.3d at p. 1073 [acting referral company was general employer and production company that received benefit of actor's services for commercial was special employer; production company entitled to summary judgment on ground of workers' compensation exclusivity].)

Although Clancey received his paycheck and W-2 form from Entertainment Partners, Fox paid Entertainment Partners for the salaries of those who worked on the *Roswell* set. Moreover, which employer paid the employee "is not particularly enlightening in determining whether a special employment relationship exists [citation], particularly in the labor brokerage context where the general employer often handles administrative details, including payroll. [Citation.]" (*Wedeck*, *supra*, 59 Cal.App.4th at p. 861, fn. 8.) Of much greater significance is the fact that Fox paid Entertainment Partners to obtain workers' compensation insurance for the *Roswell* crew and Fox was identified as an additional named insured on the policy. Entertainment Partners simply provided payroll and administrative services to Fox, which controlled the terms of employment and working conditions of Clancey and the other members of the *Roswell* crew. Based on these facts, Entertainment Partners plainly was Clancey's "general employer" and Fox was his "special employer." (See *McGee Street Productions v. Workers' Compensation Appeals Bd.* (2003) 108 Cal.App.4th 717, 720 [referring to Entertainment Partners as a general employer that handled payroll and regular workers' compensation benefits and to a production company as the special employer].)

Clancey argues that Entertainment Partners, not Fox, controlled the *Roswell* set because his immediate supervisors and several additional people higher in the chain of command on the set were all affiliated with Entertainment Partners. Clancey's conclusion regarding "control," based on the relationship of certain production personnel to Entertainment Partners, is unwarranted. Fox hired the entire *Roswell* production crew through Entertainment Partners; all the crew members were its special employees. No

evidence suggests Entertainment Partners -- a payroll company -- had any role in producing *Roswell* or managing the set. To the contrary, a Fox executive maintained ultimate responsibility for the *Roswell* production. Even according to Clancey, Entertainment Partners' role was simply to distribute checks. That Clancey filled out certain forms bearing Entertainment Partners' name or logo evidences Entertainment Partners' administrative functions and demonstrates only that Clancey was in a dual employment situation with Entertainment Partners and Fox.

The three-way relationship among Clancey, Entertainment Partners and Fox is akin to the relationship between a worker hired by a temporary employment agency and sent out to an employer. The temporary employment agency is the general employer, and the employer receiving the benefit of the worker's services is the special employee; both general and special employer are entitled to the protections of workers' compensation exclusivity. (See, e.g., *Wedeck*, *supra*, 59 Cal.App.4th at pp. 858-862 [temporary employment agency was general employer that placed employee with special employer, which controlled and directed employee's activities]; *Riley v. Southwest Marine, Inc.*, *supra*, 203 Cal.App.3d at pp. 1250-1251 [worker who receives employment through temporary employment agency is in dual employment situation with the agency and the company for which he is sent to work]; *Santa Cruz Poultry*, *Inc. v. Superior Court*, *supra*, 194 Cal.App.3d at pp. 582-583 [temporary employment agency that merely arranges for labor and does not provide equipment is general employer, while employer that utilized employee and directed his work is special employer].)

Clancey's alleged belief that he was employed only by Entertainment Partners, not by Fox, is insufficient to avoid summary judgment on the question of special employment. (*Riley v. Southwest Marine, Inc.*, *supra*, 203 Cal.App.3d at p. 1249 [plaintiff's belief he was employed only by temporary employment agency did not negate finding that he was a special employee of the company for which he was sent to work].) Clancey's belief is belied by the fact he signed an employment agreement with Fox, one he knew was required for him to begin work on *Roswell*. (See *Lyons v. Security Pacific*

Nat. Bank (1995) 40 Cal.App.4th 1001, 1014 [summary judgment cannot be avoided by assertions based on speculation and conjecture that lack factual support].)

In sum, the undisputed facts on summary judgment demonstrate Fox was Clancey's special employer and thus immune from tort liability under the doctrine of workers' compensation exclusivity.[2]

DISPOSITION

The judgment is affirmed. Fox is to recover its costs on appeal.

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PERLUSS, P. J.

We concur:

JOHNSON, J.

WOODS, J.

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[2] Clancey also faults the trial court's finding that Fox established as a matter of law it had secured workers' compensation insurance, as required by Labor Code section 3602, subdivision (d), through an agreement with Entertainment Partners. Entertainment Partners' maintenance of a valid, enforceable workers' compensation policy covering *Roswell* production employees can hardly be disputed because Clancey made a claim on that policy and received benefits as a result of his work-related injury. Nonetheless, Clancey argues Fox failed to prove by competent evidence that it was an additional insured on that policy. However, in a declaration in support of summary judgment, Fox vice-president Eileen Ige-Wong testified that, by agreement, Entertainment Partners maintained a workers' compensation insurance policy to cover work-related injuries to *Roswell* personnel; Fox was an additional insured on the policy; and Fox was charged for the premiums for the coverage attributable to *Roswell* employees. Clancey's objections to this declaration testimony on the grounds of lack of personal knowledge and hearsay were properly overruled; and Clancey failed to present any evidence to contradict Fox's showing.